

HONOURABLE SRI G.S.SINGHVI, THE CHIEF JUSTICE

AND

HONOURABLE SRI JUSTICE R.SUBHASH REDDY

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W.P.NO.27619 OF 2005

BETWEEN

M/s. Vijay Prestressed Products (P) Ltd and another

... Petitioners

And

The Commissioner of Customs & Central Excise,

Visakhapatnam-I Commissionerate,

Port Area, Visakhapatnam and another

.... Respondents

:: JUDGMENT::

Counsel for the Petitioners : Mr.A.Swarveswara Rao

Counsel for the Respondents : Mr.A.Rajasekhara Reddy, Assistant

Solicitor General for RR 1 & 2.

Dated 27.12.2005

Per G.S.Singhvi, CJ

This petition filed for quashing order dated 22.8.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore can appropriately be termed as an attempt by the petitioners to bypass the statutory remedy of appeal available to them under Section 35-G of the Central Excises and

Salt Act, 1944 (for short 'the Act').

Petitioner No.1 M/s Vijaya Prestressed Products (P) Limited, is engaged in the manufacturing of prestressed cement concrete sleepers in its factory at Pendurthy, District Visakhapatnam. The goods manufactured by it fall under chapter heading No.6807.00 of the Schedule to the Central Excise Tariff Act, 1985. After about three years of the incorporation of petitioner No.1, its managing director Shri M.S. Raju established sole proprietorship concern under the name and style of M/s Usha Prestress Udyog (petitioner No.2). On 4.3.1993, the premises of the petitioners were searched by the officers of Central Excise, Division-II, Visakhapatnam and Headquarters Anti Evasion Unit, Visakhapatnam. As a follow-up action, show cause notices were issued to the petitioners for levy of duty on the sleepers cleared by petitioner No.2. This was done by invoking Section 11A(1) of the Act. Penalty notice under Rule 173Q read with Rule 209 of the Central Excise Rules, 1944 was also issued. After considering the objections filed by the petitioners, Commissioner of Central Excise and Customs, Visakhapatnam-1 (hereinafter described as 'the Commissioner') passed order dated 13.2.1995 whereby he created a demand of Rs.8,18,313/-. On appeal, the Tribunal set aside the order of the Commissioner and remanded the case for de novo adjudication.

In compliance of the direction given by the Tribunal, the Commissioner issued fresh notices to the petitioners, heard the arguments of their advocate, examined the record and passed order dated 31.12.2002 vide which he reiterated the demand of duty. He negatived the petitioners' plea that they were separate and independent units and the goods manufactured by petitioner No.2 could not be treated as the goods manufactured by petitioner No.1 for the purpose of levy of duty. The Commissioner considered the plea of the petitioners in the back drop of evidence brought on record and concluded that the two units were intrinsically connected with each other and the so called manufacturing of prestressed sleepers by petitioner No.2 was a sham transaction and in fact the goods were manufactured by petitioner No.1. The discussion made by the Commissioner on this issue is contained in paragraphs 13, 14, 15, 18 and 19 of order dated 31.12.2002, which are extracted below.

“13. In determining the status of a manufacturer for the purpose of clubbing, it has to be seen whether the units are companies

under the Companies Act or a firm or an individual. In this Case, I find that VPP is a private limited company and UPU is a proprietorship firm owned by Shri MS Raju as the proprietor. Shri M.S.Raju also owns shares in VPP as a Karta of HUF as also he is the Managing Director in VPP. The proprietorship firm is not separate from the individual who, in this case, is Shri MSR Raju. Thus UPU has no separate identity than that of M.S.Raju. Thus M.S.Raju has a three tier association in VPP, as HUF Karta, as Managing Director, as proprietor of UPU which has taken loans from VPP of appx. 30 lacs unsecured and without any interest tie up as normal in commercial trade for such finance. I find that they are so inextricably associated that separate of identity is not possible. When separation of their identity is not possible, there is free flow of funds and UPU are described as their sister concern or their subcontractor or their production unit 2, the exemption under notification 175/86 cannot be made available to UPU as all clearances have to be taken by VPP or on their behalf.

14. I further find that, even though VPP is a private limited company, yet there are provisions in the Companies Act which require the directors to disclose their interest if any, in other firms or companies or individuals with which they enter transactions in the name of the company. There is no such evidence on record that any approval was obtained by VPP as a limited company for passing on their contract to UPU. It is also seen from the case facts that the goods were manufactured by VPP out of its own raw materials. Only they were removed in the name of UPU. This removal under the name of UPU was for no other reasons than that of evasion of duty payable by them otherwise if the clearances were in VPP's name.

15. It is also seen that Shri Raju cannot act differently as a proprietor in UPU and as MD in VPP. If both were limited companies, the issue would have been different. Thus, by the very nature of the constitution of the two, UPU cannot claim to be an independent firm unless it could show that apart from statutory registration under different laws, they had independent manufacturing facilities, independent financial and management control and independent infrastructure to manufacture goods. There is no such evidence on record except the fact that a transaction is entered in the name of UPU for which VPP had procured orders, paid for the raw materials, manufactured in their own premises but clearance is made in the name of UPU. The evidences adduced by the parties are mainly on separate registration under various laws, separate filing of returns, inter unit transactions being of commercial nature etc., These become over ruled in the fact of the over riding facts as discussed above. The CEGAT however observed that there was no finding that there was nay flow back or mutuality of interest between the two. Thus, the case stands, if it was proved that there was flow back

and mutuality of interest.

18. In the backdrop of above, I find that it would be further relevant to concentrate on the single transaction of clearance of 12000 sleepers which is the core to the issue and which will bar out the above view that UPU were only a subterfuge to VPP. Except for this, there are no other clearances during the year 1992-93. The facts as made out in the notice are that VOO had responded to the tender dated 5.3.1991 of Visakhapatnam Port Trust for 12000 sleepers and paid the EMD of Rs.90,000/- and had quoted prices inclusive of excise duty payable. However, later, they vide their letter dated 3.7.1991 requested VPT to place the said order on their sister concern UPU located in the same premises in consequence of which VPT placed the order for the said 12000 sleepers for a total value of Rs.94,80,000/- inclusive of excise duty and sales tax @ of Rs.790/- per sleeper in the name of UPU and in the acceptance letter, they informed that EMD of Rs.90,000/- paid by VPP shall be retained for them. In the show cause notice, it is stated that VPP were obliged to manufacture sleepers for Railways only as they were given the land on lease exclusively for manufacture of sleepers for them and certain guidelines were agreed for acting upon for this consideration. In pursuance of these guidelines, VPP approached Railways to given them permission to execute the order for VPT through their sub contractor UPU who have been entrusted to look after the production of their Unit No.2 and that such production through the sub contractor was permissible as per the guidelines. The letter dated 12.12.1992 to this effect is reproduced in the show cause notice in para 6. In para 7 of the notice, the facts are made more clear in that VPT had to ask Railways to give permission to VPP for supply of 120000 sleepers in view of urgency as VPP were obliged in terms of the agreement with Railways to manufacture and supply sleepers for Railways only on the leased land. The supplies to VPT commenced in the name of UPU just one day after the permission from Railways was made. Thus, it is clear that VPP had already made supplies ready, that it as only a book adjustment in that the contract was shifted in the name of UPU for no reasons.

19. Further, the statement dated 4.3.1993 of Shri T.B.Gangadhara Rao, Typist-cum-clerk, UPU as stated in para 2(iii) of the notice shows that w.e.f. 1.1.1993 they used the raw material of VPP, that sleepers were manufactured out of their material and were entered in UPU's account, that debit entries were made in the RG 23 register of VPP as if the raw materials were used by VPP and that until 18.2.1993, there was no raw material account for UPU. The defence of VPP and UPU is silent on this. If UPU were an independent manufacturer, they would never be in a position to obtain the contract, they would never be able to start their operations from the premises as these premises were licensed

only to VPP, they had no financial capability to undertake supplies for 98,80,000/-, they had no raw materials of their own, the goods were already manufactured using their (VPP) own raw materials and were supplied in the name of UPU next day of the permission received from the Railways. VPP had tendered the quotation and deposited 90,000/- as EMD and they were able to change to the UPU account by citing UPU as their sister concern. UPU, on their own never came forward to respond to the tender and offer the supplies. It was only manipulation of the contract or tender through citing UPU as their subcontractor or a sister concern. This mode of supply, in a way, itself proves that VPP were the manufacturer who were supplying the goods under the tender through their subcontractor or the sister concern from their production unit No.2. Unit 2 is what is called UPU and thus VPP quoted in their letter that UPU were their subcontractor looking after their production unit No.2. Since the transaction is through a tender, if UPU were an independent manufacturer, they would have made offer to the tender. This was not done. Thus, with regard to the clearance of 12000 sleepers, it can, by no means, be held that there was any independent manufacture by UPU. The entire manufacture and supply was arranged by VPP. UPU was thus, only a dummy for VPP in this case.”

The appeal filed by the petitioners against the aforementioned order of the Commissioner was dismissed by the Tribunal vide its order dated 22.8.2005.

The petitioners have challenged the order of the Tribunal mainly on the ground that the ex parte order passed by it is vitiated due to violation of the rules of natural justice. They have averred that the appeal was listed for hearing before the Circuit Bench of the Tribunal at Hyderabad on 12.10.2004 but on that day, the case was adjourned because the same did not reach for hearing. Thereafter, the case was posted for hearing at Bangalore on 8-6-2005, but the same was adjourned at their request. On the next date of hearing i.e. 22.8.2005, the petitioners sent a telegram to the Tribunal seeking adjournment on the ground of illness of their advocate. The petitioners' case is that notwithstanding the bona fide request made by them, the Tribunal proceeded to hear the appeal on merits and dismissed the same.

Learned counsel for the petitioners fairly conceded that under Section 35-G of the

Act an appeal can be filed before this Court against the order of the Tribunal, but argued that the remedy of appeal provided under that section cannot be treated as an effective alternative remedy because the appeal under that section can be filed only if a substantial question of law arises for determination by the High Court. He then argued that the reason assigned by the Tribunal for declining his clients' request for adjournment is legally untenable and, therefore, the Court may quash the order under challenge and remand the case for fresh adjudication of the appeal.

We have considered the submissions of the learned counsel but have not felt persuaded to agree with him. In our opinion, when the statute, viz., 1944 Act contains a provision for remedy of appeal, the petitioners cannot be allowed to bypass the statutory remedy and invoke the jurisdiction of this Court under Article 226 of the Constitution of India on the spacious ground that the appeal can be entertained by the High Court only if substantial question of law arises. At this stage, it is not proper for us to express an opinion whether order dated 22-8-2005 passed by the Tribunal gives rise to substantial question of law because that can be seen only when the petitioners file appeal under Section 35-G. However, we do not have any doubt that once the legislature has made a provision for appeal against an order passed by the Tribunal, the aggrieved party cannot be allowed to bye-pass that remedy by filing petition under Article 226 of the Constitution of India.

De hors the aforementioned conclusion, we are satisfied that the petitioners have failed to make out a case for interference with the order under challenge. Admittedly, the appeal had been adjourned by the Tribunal on two previous occasions. The third adjournment was sought by the petitioners by sending a telegram that their advocate was not well. From the record, it does not appear whether the petitioners had sent medical certificate in support of their request for adjournment. Before this Court, certificate showing illness of his client and his consequential inability to go to Bangalore has not been produced. It has also not been disclosed as to what was the ailment, which prevented the advocate of the petitioners from appearing before the Tribunal. During the course of hearing, we enquired from the learned counsel for the petitioners whether the petitioners are in possession of any such evidence but he could not produce the same for our perusal. In this view of the matter, we are inclined to take a view that the petitioners had conjectured the ailment of their advocate only for the purpose of seeking adjournment and the Tribunal did not

commit any jurisdictional error by refusing to entertain their request and dispose of the appeal keeping in view the provisions of Section 35-A of the Act.

At this stage, learned counsel for the petitioners submitted that his clients may be given liberty to avail the remedy of appeal under Section 35-G of the Act.

For the reasons mentioned above, the writ petition is dismissed. However giving liberty to the petitioners to avail remedy of appeal under Section 35-G of the Act.

G.S.SINGHVI, CJ

Dated 27.12.2005

R.SUBHASH REDDY, J

Msv / vtv / svs